No. 75-552

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 514 F. 2d 856. The order of the court of appeals granting an injunction pending appeal (Pet. App. B) is reported at 509 F. 2d 533. The order of the court of appeals remanding the case to the district court for supplemental findings (Pet. App. C) is not reported. The opinion of the district court (Pet. App. D) and its supplemental findings of fact (Pet. App. E) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F) was entered on June 16, 1975. By order of September 3, 1975, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 10, 1975. The petition was filed on October 9, 1975, and was granted on January 12, 1976. (On the same day, the Court granted the petition for a writ of certiorari in *American Electric Power System* v. *Sierra Club,* No. 75–561, filed by the intervenor-defendants in this case.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Federal law authorizes the Department of the Interior to permit coal mining on federal lands by private parties under approved mining plans. In order to evaluate the environmental effects of its leasing program and decide upon future actions, the Department prepared a nationwide, programmatic environmental impact statement. Before issuing individual leases or approving mining plans having a significant effect upon the environment, the Department prepares an environmental impact statement considering the effects of that lease or mining plan, both individually and in combination with other leases. When necessary or appropriate, the Department also prepares impact statements for areas embracing several leases and plans, such as the 7,800 square mile "Eastern Powder River Basin" within Wyoming.

The question presented is whether, under the National Environmental Policy Act, a court may inter-

vene in this decision-making process to require federal agencies to engage, in addition, in "regional" planning and to issue an additional impact statement for a four-state area so long as they continue "contemplating" private applications, even though there neither is nor will be a recommendation or report on a proposal for major federal action with respect to that four-state area.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

> (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> * * * * *

STATEMENT

A. FEDERAL PROGRAMS FOR COAL DEVELOPMENT

Coal represents about 94 percent of our Nation's identified primary energy reserves (App. 188). As much as 80 percent of the Nation's coal is under land owned by the federal government, or under land that can be mined effectively only after obtaining rights of way across federal land.[1]

The coal deposits in the West have assumed greater significance as sources of energy not only because of their abundance[2] but also because of their low sulfur content (which makes them environmentally desirable) and their relatively easy recovery by surface mining methods.

Congress has recognized the importance of coal in America's energy future. The Energy Policy and Conservation Act, Pub. L. 94–163, 89 Stat. 871 *et seq.*, enacted on December 22, 1975, has as one of its purposes the reduction of "the demand for petroleum products and natural gas through programs designed to pro-

[1] Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* 1–7 (1975) (hereafter *National Impact Statement*). A copy of the *National Impact Statement* has been lodged with the Clerk of this Court.

[2] The Department of the Interior has divided the Nation's coal lands into six "provinces": (1) the Pacific Coast province, including Alaska; (2) the Rocky Mountain province; (3) the Northern Great Plains province (covering the Dakotas, Montana, Wyoming, Idaho, Nebraska, and Colorado); (4) the Interior province; (5) the Gulf province; and (6) the Eastern province. The Northern Great Plains and Rocky Mountain provinces contain about 54 percent of the Nation's identified low-sulfur coal.

vide greater availability and use of this Nation's abundant coal resources * * *" (Pub. L. 94–163, 89 Stat. 874). In order to facilitate the accomplishment of that goal, that Act provides to the Administrator of the Federal Energy Administration the power to compel utilities and certain other petroleum users to convert to coal use.[3] See Pub. L. 94–163, Section 101, 89 Stat. 875.

Coal situated under federal lands can be mined only with the permission of the federal government. The Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. (1970 ed. and Supp. IV) 181 *et seq.*, authorizes the Department of the Interior to dispose of certain minerals by leasing to private firms and individuals, for terms of years, the rights to develop and extract coal, oil, and other minerals that lie within the federal domain and Indian lands. As privately owned coal deposits become exhausted or more expensive to mine, and as the Nation's energy needs grow, coal underlying federal lands will become more and more important as a source of energy.[4]

The development of these vast reserves of coal will inevitably affect the quality of the human environment in the vicinity of the mines. The federal government not only has the duty to superintend the development of its mineral resources, but also has the

[3] The Administrator had, until June 30, 1975, enjoyed such power under the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246. The Administrator has directed 74 power generation plants to convert to coal. 40 Fed. Reg. 28430.

[4] See *National Impact Statement*, *supra*, note 1, at 1–24 to 1–28.

duty, articulated by the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, to probe the environmental consequences of its proposed actions and to develop its resources in a manner that holds to a minimum the disruption of the environment.

In order to fulfill both of these duties, federal agencies, cooperating with each other, with state governments, and with private interests, began to take a careful look at the effects of coal development in the northern Great Plains, where extensive federal coal resources are located. On May 26, 1970, the Department of the Interior initiated the North Central Power Study, which was designed to "investigate the potential for coordinated development of the electric power supply in the north central United States" (Pet. App. 89A). "The responses received did not indicate that a plan for * * * coordinated development could be formulated" (*id.* at 90A), and the Study was terminated in 1972.

The Department of the Interior also began a study of potential water resources in Montana and Wyoming, and the extent to which these resources would be adequate for, and affected by, mining of coal (*ibid.*). This study was suspended on June 30, 1972, when the Department initiated the Northern Great Plains Resources Program, a much more comprehensive investigation of the social, economic and environmental aspects of coal development. That study was designed to provide much-needed information that

could guide the federal government in decision making. "The study is to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). The final interim report of this Program was issued on August 1, 1975.

In order to avoid making piecemeal decisions while it was gathering environmental information and formulating a national coal leasing program, the Department of the Interior announced on February 17, 1973, that it would issue no more coal prospecting permits and, with a few carefully circumscribed exceptions, that it would issue no more coal leases and approve no more mining plans until it had reevaluated its policies and conducted a full environmental study (*id.* at 90A–92A). The Department simultaneously announced that it would prepare an environmental impact statement assessing the effects of its coal program on a nationwide basis and undertaking to formulate a new program more sensitive to environmental values. A draft of this national "programmatic"[5] impact statement was issued in 1974. It was rewritten in response to comments and reissued in final form on September 19, 1975.[6] The final impact statement describes "the total proposed Departmental coal leasing program"[7] and announces the creation of a multistep Energy

[5] A "programmatic" impact statement is a statement that assesses the environmental consequences either of a large number of related federal actions constituting a "program," or of a method of making decisions that will influence a large number of related federal actions.

[6] *National Impact Statement*, *supra*, note 1.

[7] *Id.* at 1–3.

Minerals Activity Recommendation System[8] that takes into account both the Nation's need for coal and the need to preserve the quality of its environment.[9]

Under the Energy Minerals Activity Recommendation System new coal leases will be made available only when necessary and, even then, "[a]ll coal lease sales would be carefully analyzed to avoid unacceptable environmental impacts or unacceptable impacts on other uses resulting from development of the proposed leases."[10] Whether leasing takes place will depend not only on the need for coal but also on the environmental consequences of mining.[11]

The national programmatic environmental impact statement has surveyed the general environmental consequences of coal mining. The environmental consequences of each particular mine, however, will have to be understood in order to implement the decision that some deposits of coal will not be leased when the environmental consequences would be too great. Whenever a mining operation would have a significant impact upon the environment, the responsible federal agency will prepare an environmental impact statement. Individual environmental impact statements

[8] *Id.* at 1–7 to 1–23.

[9] The Energy Minerals Activity Recommendation System was formally adopted on January 26, 1976, and the moratorium on approvals of coal leases and mining plans was terminated. See the statement of Secretary Kleppe reprinted as an appendix to the brief of petitioners in No. 75–561.

[10] *National Impact Statement*, *supra*, note 1, at 1–5.

[11] *Id.* at 1–13.

sometimes will be prepared for particular leases and mining plans,[12] and the statements for successive leases or mining plans will assess the cumulative effects of all coal mining within the area affected. In many other cases the Department of the Interior will prepare a broader impact statement assessing the effects of coal development in larger parts of the country: "the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors."[13]

Several such impact statements already have been prepared. One of them, issued in final form in 1974 and consisting of 6 volumes and 3075 pages, covers the Eastern Powder River Coal Basin in Wyoming, an area of approximately 7,800 square miles that contains more than one quarter of the Nation's surface coal reserves and three quarters of the coal reserves recoverable by surface or underground mining in the northern Great Plains.[14]

[12] A more complete description appears in *id.* at 1–4. See also the affidavit of Secretary Kleppe at App. 189–196.

[13] *National Impact Statement*, *supra*, note 1, at 1–4.

[14] Department of the Interior, *Final Environmental Impact Statement: Proposed Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming* (1974). See I *id.* at I–21 to I–22 (estimating that the basin contains 12.4 billion tons of economically recoverable coal out of a national total of 45 billion tons of coal economically recoverable by surface mining). A copy of this impact statement has been lodged with the Clerk of this Court.

B. THE COMPLAINT AND THE DISTRICT COURT'S DECISION

Respondents Sierra Club and six other organizations [15] brought suit against various federal agencies [16] on behalf of themselves and their members seeking declaratory and injunctive relief against any approval of leases, rights of way or mining plans in what their complaint called the "Northern Great Plains Region" until the federal government had prepared a comprehensive impact statement with respect to that "Region" (App. 5–26; cf. Pet. App. 85A).[17]

Discovery proceeded by interrogatories addressed to the federal defendants. When this had been completed respondents, without filing any affidavits in their own behalf, moved for summary judgment (App. 101–

[15] The National Wildlife Federation; the Northern Plains Resource Council (NPRC); the League of Women Voters of Montana; the Montana Wilderness Association; the Montana League of Conservation Voters; and the League of Women Voters of South Dakota. With the exception of NPRC, neither these organizations nor Sierra Club had established standing to sue. Pet. App. 20A–21 A, n. 20.

[16] The Departments of the Interior, the Army and Agriculture.

[17] The "Northern Great Plains Region" defined by the complaint includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota (Pet. App. 88A). This "Region" encompasses some 90,000 square miles (Pet. App. 5A, n. 4). The "Region" is significantly different from the "Northern Great Plains coal province" as defined by the Department of the Interior (see note 2, *supra*).

The district court permitted intervention, as defendants, by the Crow Tribe of Indians, an individual rancher, eight electric public utilities, three natural gas companies, and four mining companies. All intervenors except the Crow Tribe petitioned for certiorari *sub nom. American Electric Power System* v *Sierra Club*, No. 75–561, granted January 12, 1976.

102). Petitioners filed several affidavits and a cross-motion for summary judgment (App. 116–17) which the district court granted on February 14, 1974 (Pet. App. 85A–101A).

An affidavit filed by Secretary of the Interior Morton stated that there was no federal proposal or program for the control of the development of the Northern Great Plains Region (App. 118–124). Respondents expressly agreed with this statement. Respondents did "not dispute the fact that [petitioners] have no plan concerning coal development in the Northern Great Plains region in the sense of a definite, rational program upon which to base their decisions"; respondents "not only admit[ted] that no plan exists," but also "strongly emphasize[d] this point" because, in their view, it "is the very absence of any such plan which demonstrates so convincingly that NEPA has been violated."[18] In light of this concession and the affidavits of Secretary Morton and other federal parties, the district court found that (Pet. App. 88A):

> The "Northern Great Plains region" as described by the [respondents] is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action.

[18] Plaintiff's Reply Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment and to Intervenor-Defendants' Various Motions, p. 13 (filed November 21, 1973).

The court also found that (Pet. App. 88A.; emphasis in original):

> There is no existing or proposed Federal regional program, plan, project, or other regional "federal action" *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the [respondents] as the "Northern Great Plains region."

Finally, the court found that (*id.* at 96A):

> There is no evidence in the record of this case that individual projects by private industry for the development of coal and other resources in the area defined by the [respondents] as the "Northern Great Plains region" are being planned or constructed as part of any integrated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in such area.

Instead of engaging in regional planning, the district court found, the federal government had been planning on a national scale. It concluded (Pet. App. 90A) that "[t]he Department of the Interior has taken action to control development of coal on a national basis, including the Northern Great Plains." The district court discussed the several studies of the effects of this national policy upon the Northern Great Plains, including the Northern Great Plains Resources Program. It concluded that these studies were not attempts to formulate a plan, program or proposal for the development of any particular "region," but instead were designed to enable the government to understand the local effects of its national policies and to plan more effectively with respect to its decisions concerning individual mines. The court found that the purpose of Northern Great Plains Resources Program "is to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A), and that all of the studies collectively "are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures" of NEPA (*id.* at 90A).

On the basis of these and other findings of fact the district court concluded that the Northern Great Plains Resources Program "is a study project and not a program for development" (Pet. App. 100A); that "[m]ultiple applications for Federal action in connection with individual private projects which are unrelated to each other, except that they involve resource development at some point within a multistate area, do not constitute a private or Federal regional plan or program for development, nor do they require the Federal Government to develop a regional plan or program for development with respect to such multiple applications" (id. at 98A); and that since "there is no existing or proposed regional program or project or other regional 'federal action' within the meaning of NEPA Section 102(2) for the development of coal or other resources in the 'Northern Great Plains region', the complaint does not set forth a claim upon which relief can be granted" (*id.* at 99A). Therefore,

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the court held no impact statement for the "Region" need be prepared."[19]

Respondents sought an injunction pending appeal, which was denied by the motions panel of the court of appeals on June 17, 1974 (Br. in Opp. App. 1a–3a). The district court later entered supplemental findings in response to a remand by another panel of the court of appeals (Pet. App. 81A–83A). These findings (Pet. App. 103A–116A) brought the record up to date as of November 25, 1974.

C. THE COURT OF APPEALS' DECISION

Shortly after the district court entered its supplemental findings, the court of appeals issued an injunction pending appeal (Pet. App. 75A–76A). This injunction prohibited the Secretary of the Interior from taking any action "concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement" (*id.* at 76A). The court of appeals did not conclude that the Eastern Power River Basin impact statement is inadequate; indeed, its adequacy has not been challenged. It recited only that "such an injunction is required to maintain the status quo pending disposition of this appeal" (Pet. App. 75A). Judge MacKinnon dissented (*id.* at 76A–80A).

[19] The district court also concluded that granting an injunction "would cause irreparable injury * * * to the public at large" (Pet. App. 101A; cf. *id.* at 96A) and that "[e]ven if there were some regional Federal program for the development of coal and other resources in the 'Northern Great Plains region', NEPA would not prohibit Federal action upon an individual project within the 'region' on the basis of an environmental impact statement prepared for that project prior to completion of the regional program" (*id.* at 100A).

Five months later a divided panel of the court of appeals reversed the district court (Pet. App. 1A–73A). The court held that although petitioners have not yet violated NEPA, they will do so if they continue "contemplating" federal action in the "Northern Great Plains Region" without preparing an environmental impact statement with respect to that part of the country. See Pet. App. 2A, 33A, 42A, 47A–48A.

The court of appeals expressly accepted "the facts as found by the District Court" (Pet. App. 39A), thereby agreeing with the district court's finding that there is no federal program or proposal calling for regional development. Indeed, the court could not have done otherwise, for there is no contrary evidence and respondents once more "agreed that the federal government has no regional plan," arguing that "the very absence of any such planning demonstrates" that NEPA "has been violated."[20]

The court of appeals addressed two questions (Pet. App. 2A): "whether [petitioners'] attempts to control development of coal resources in four western states constitute a major federal action * * * and, if so, whether those attempts are sufficiently developed to require the filing of a comprehensive regional impact statement." Although the district court's factual

[20] Brief of Appellants, p. 47.

findings would appear to require a negative answer to both questions, the court of appeals answered the first question in the affirmative and remanded the case to the district court to determine whether the time was "ripe" for an affirmative answer to the second.

The court of appeals began its legal discussion by considering respondents' argument that the various private requests for leases and rights of way were so related that the government should be required to develop a regional plan accompanied by a comprehensive impact statement (Pet. App. 28A–32A). The court of appeals stated that although it did "approve, in theory" the legal basis of respondents' argument (*id.* at 31A–32A), it was unnecessary to consider the point further. It decided instead that, by engaging in regional studies and analyses such as the Northern Great Plains Resources Program, and by receiving (albeit not granting) applications for leases, the government had demonstrated "attempts" (*id.* at 2A, 34A, 36A, 39A) "to control development" of coal resources in the area, which establish that a "regional program" "is *contemplated*" by the government (*id.* at 33A, 39A, 42A; emphasis added). These "attempts" and "contemplation" in turn trigger the impact statement requirement of NEPA, the court held, and a "regional" impact statement must be prepared at the appropriate time (*id.* at 33A–34A, 39A). The court concluded (*id.* at 33A–34A; emphasis added) that "the relevant question is not whether major federal actions are *being* taken in the Northern Great Plains, nor is it whether impact statements are necessary for those actions. The

question is whether [petitioners] have treated those actions regionally in such a way that they comprise, cumulatively, a major federal action. We believe the evidence mandates an affirmative answer."

The court's emphasis upon "attempts" and "action" in some passages of the opinion is not fully consistent with its emphasis upon "contemplation" in other passages. For example, in the beginning of the opinion the court held that the government has engaged in "major federal action" (Pet. App. 2A); near the end of the opinion the court stated only that major federal action is "contemplated" (*id.* at 42A). Despite this latter conclusion—that the government is "contemplating" regional development—the court stated that the "Government has not yet finally settled on its role" (Pet. App. 45A). The court remanded the case to the district court and directed the federal agencies to determine whether they would prepare an impact statement or whether "contrary to expectations" they would cease following the course the court thought they had been following (*id.* at 47A–50A). If the government decided not to prepare an impact statement for the region described by respondents, the court stated, respondents may "present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement" (*id.* at 50A). Since the court already has indicated (*id.* at 29A–32A) that the "legal basis" of respondents' contention is correct, it follows that the district court would be empowered to direct the government to

prepare an impact statement if it declines the court of appeals' invitation to do so voluntarily.

The court's discussion contains numerous descriptions of the appropriate time for release of the final impact statement. The court variously states that "an impact statement [must] accompany all proposals" (Pet. App. 3A); that "[a] statement must precede the recommendation" (*id.* at 42A); that "a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action" (*ibid.*); that "[t]he impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made" (*id.* at 47, n. 35; emphasis in original); and that "a comprehensive [impact statement] should accompany the proposal for action" (*id.* at 48A). Although these statements are not entirely consistent, their thrust appears to be that the final impact statement must be issued well in advance of any recommendation or report on a proposal for major federal action.[21]

[21] The court of appeals discussed four "ripeness factors" that, it thought, controlled the proper timing of the regional impact statement that would be required unless, "contrary to expectations," the government abandons the course the court thought it had been following. Two of these indicated to the court of appeals (Pet. App. 44A) that "the time for a statement is indeed ripe." The district court apparently would be free to consider only the other two. The first of those two is "the relevant geographic area for development" (*id.* at 45A), a question that seems to bear neither on timing nor on the need for a regional impact statement, but on the scope of the statement that must be prepared. The second is whether the moratorium on the approval of further leases or mining plans remains in effect (Pet. App. 46A). Since the moratorium now has been lifted, the district court apparently would be compelled to resolve this factor in favor of ripeness. The upshot of all of this is that an impact statement must be prepared unless the federal government decides not to approve any mining of coal. Even then, the court of appeals indicated, an impact statement might be required (*id.* at 48A and n. 37).

The court of appeals continued in effect its temporary injunction pending appeal, even though it conceded that the "Secretary of the Interior has shown concern over developing the coal reserves of the Province in a responsible manner consistent with NEPA" (Pet. App. 4A–5A).

Judge MacKinnon dissented, observing that the "record * * * does not establish the existence of any comprehensive *regional* program of the type * * * which could justify requiring the preparation of a regional environmental impact statement at this time" (*id.* at 54A). Because there was neither federal action with respect to the region, nor a proposal for such action, Judge MacKinnon "conclude[d] that a regional environmental impact statement * * * is not presently required * * * [and found] no need to remand the case for further proceedings" (*id.* at 52A–53A).

D. SUBSEQUENT PROCEEDINGS

Petitioners requested the court of appeals to dissolve its injunction relating to the four pending proposals in the Eastern Powder River Basin. In support

of this application we submitted an affidavit by Frank G. Zarb, Administrator of the Federal Energy Administration (App. 205–208) and an affidavit by Thomas S. Kleppe, Secretary of the Interior (App. 187–204). Mr. Zarb's affidavit stated that orderly development of this Nation's coal resources is crucial to the attainment of the national goals embodied in *Project Independence Blueprint*. Secretary Kleppe stated once more that the final interim report of the Northern Great Plains Resources Project neither constitutes a "proposal for federal action nor does it recommend or propose a development plan for the area" (App. 191), and he made it clear that the Department "does not have a plan or program to develop or contribute to the development or to control the development of coal resources in the Northern Great Plains, the Rocky Mountain area, Appalachia, or any other 'region' or 'province', as such, in the country" (App. 195–196). Both Secretary Kleppe and Administrator Zarb demonstrated in detail the reasons why further delay in governmental approval of leases and mining plans pending the preparation of a regional impact statement would seriously undermine the government's ability to deal with the need for energy.

On October 9, 1975, respondents requested the court of appeals to enlarge its injunction so as to encompass yet another mining operation in the Northern Great Plains, the Belle Ayr South mine of the Amax Coal Company. Amax was not a party to the suit. It had been mining coal for about three years and sought

the Department's approval of a mining plan covering proposed mining of 126 acres per year. Amax intervened and, opposing respondents' motion, explained that without federal approval of its plans it would have to discontinue operations within a few months. We joined Amax in opposing this motion.

On November 7, 1975, the court of appeals denied the federal petitioners' motion to dissolve the injunction and remanded respondents' motion to the district court (Br. in Opp. App. 4a–5a). On November 14, 1975, after holding a hearing, the district court issued an order denying respondents' motion absolutely to enjoin approval of the Amax mining plan, but it enjoined Amax' operations after two years at the rate of mining of 126 acres per year, pending a final disposition of this case (*id.* at 6a–7a).

On November 14, 1975, we requested this Court to stay the court of appeals' injunction pending its resolution of this case. The Court issued the stay on January 12, 1976. On February 13, 1976, Secretary Kleppe approved the four mining plans that had been analyzed by the Eastern Powder River Basin impact statement.

On January 26, 1976, the Department announced that the moratorium against approval of leases and mining plans would be lifted and that the Energy Minerals Activity Recommendation System described in the national programmatic impact statement would be put into effect. See the appendix to petitioners' brief in No. 75–561.

SUMMARY OF ARGUMENT

A. "In order to decide what kind of an environmental impact statement need be prepared"—or, indeed, whether one need be prepared at all—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 322 (*SCRAP II*). In *SCRAP II* the private railroads proposed an increase in freight rates; here private firms seek permission to mine coal. The federal action is, in either case, the grant of permission to do so. The Mineral Leasing Act of 1920, 30 U.S.C. 201(a), governs the authority of the Department of the Interior to issue coal leases and to approve mining plans. That Act creates authority to proceed tract-by-tract, application-by-application. The Department of the Interior has proceeded in the authorized manner; it has never proposed a separate "regional" plan for coal development.

The Interior Department has, however, formulated a national coal development policy and has evaluated the effects of its coal program in a national coal programmatic impact statement. This effort represents the federal government's attempt to understand the effects of its policies, and to coordinate its decisions, with respect to coal development.

Coal development creates "regional development" only because federal lands are scattered throughout the many "regions" of the Nation. That tenuous connection between a "region" and the national coal policy does not establish that the federal policy is one of

"controlling the development" of any region. Nor does the existence of the Northern Great Plains Resources Program establish that the federal government is either "attempting" to engage in "regional development" or "contemplating" doing so. The district court found that the Northern Great Plains Resources Program is designed "to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). Therefore, because the relevant "federal action" is either national or local in character, no "regional" environmental impact statement is necessary.

B. The court of appeals apparently believed that the effects of even a single mine are so pervasive that a "regional" impact statement must be prepared before any mining can commence. But although NEPA requires that an impact statement analyze the "unavoidable" environmental effects of a particular project, and the resources "irretrievably committed" by the federal action in question, the approval of mining at a particular site does not "irretrievably" or "unavoidably" establish any pattern for the region as a whole. While we agree that the effects, even (within reason) the far-flung effects, of a single mine must be analyzed in the impact statement pertaining to that mine, "development of the region" is not an effect of mining in a single location. Approval of mining in one place does not make approval of mining elsewhere inevitable. Although the amount of coal mined in the Northern Great Plains will no doubt increase over time,

that increase is attributable to the nationwide need for energy, and not to any effects of one lease upon the application for any other.

C. Even if the court of appeals were correct that major federal action is "contemplated" with respect to the Northern Great Plains as a region, it would not follow that an impact statement is required. Section 102(2)(C) of NEPA provides that an agency shall include an impact statement "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment. The statutory language states in the clearest terms that the final impact statement must accompany the recommendation or report. Until there has been a "proposal," and until there has been a "recommendation or report" on that proposal, there is no need for such an impact statement. As the Court held in *SCRAP II, supra*, 422 U.S. at 320 (emphasis in original), "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." Since it is undisputed that there has been no proposal for a regional plan or program with respect to the Northern Great Plains, and that there has been no recommendation or report on such a proposal, there is no need for a "regional" impact statement.

D. The court of appeals approved in theory respondents' argument that NEPA requires the federal government to engage in "regional planning." In order

to do so, of course, the government would be required to prepare a regional plan—and that, the court wrote, would require a regional impact statement. While the court said it was unnecessary to rest its decision on this ground, we submit that it did so, since it is otherwise impossible to explain why the court thought it inadequate for the government to study the Nation as a whole, each individual mine, and the Eastern Powder River Basin.

The Mineral Leasing Act contains no requirement of regional planning. Its provisions state that leases shall be offered tract-by-tract. Since NEPA does not amend by implication any other statute (*United States* v. *SCRAP*, 412 U.S. 669, 694, (*SCRAP I*)), the tract-by-tract method established by the Mineral Leasing Act is not altered by NEPA. Moreover, Section 102(2)(C) of NEPA itself plainly contains no requirement of "regional planning;" that Section simply provides that a report or recommendation on a proposed plan must be accompanied by an impact statement. It does not require the creation of any particular plan, nor that any plan have particular substantive content.

Even if comprehensive planning is required by NEPA, there was no principled basis upon which the court of appeals could set aside the responsible federal agencies' decisions to conduct a national programmatic study and to supplement that study with impact statements on local mines and regional groupings of mines. Here, as in *SCRAP II*, the responsible

agencies have considered the broad environmental consequences in a consolidated proceeding; it was not an abuse of discretion for these agencies to proceed in individual impact statements to analyze the marginal environmental effects of particular mines or groups of mines.

E. Whether or not a "regional" impact statement is necessary for the Northern Great Plains as a whole, individual projects, the environmental effects of which have been fully analyzed, should not be delayed. As a general rule, no valid interest could be served by allowing a particular project of independent utility—a project that is desired because of that utility and not because of its relationship to some larger project—to be held hostage by objections to the larger project or action that has yet to be proposed or analyzed.

ARGUMENT

This is the seventh year that NEPA has been in effect. During that entire period the Department of the Interior and other federal agencies have been giving careful scrutiny to the environmental effects of coal mining. Several extensive environmental, economic and social studies have been carried out; a national programmatic impact statement has been prepared; individual, local and regional impact statements have been issued. For almost three years there has been a virtual moratorium on the issuance of prospecting permits and leases and the approval of mining plans. Now that the federal government is preparing to implement the carefully designed Energy

Minerals Activity Recommendation System on a national basis and to lift the moratorium, it has been instructed by the court of appeals to delay its program for several years more while it prepares yet another environmental impact statement covering a "region" of respondents' choosing.

The court of appeals' decision does little to promote constructive environmental planning. Such planning has been taking place for many years on a systematic and comprehensive basis. The responsible federal agencies have attempted to assess the environmental effects of coal mining on national, regional and local levels, and have conducted extensive studies (such as the Northern Great Plains Resources Program) in cooperation with local and state governments, affected industries, and other interested groups and individuals. The environmental analyses and impact statements produced by these processes discuss the effects of coal mining in general, and of most mines, two or three times over; the adequacy of most of these analyses and statements has been accepted without judicial challenge. Respondents have sought, instead, to compel federal officials to generate still another layer of environmental assessment, and to prepare an impact statement addressing an area smaller than the Nation as a whole but larger than the largest "region" the federal government has selected for study. It is hard to see what can be gained by such additional study. Valuable time would be lost while the statement is pepared, however, and valuable resources would be consumed in the process.

The district court found that there is no federal plan or proposal for the development of the "Northern Great Plains Region" as a region (see pages 11–14, *supra*). The court of appeals (Pet. App. 39A) and respondents have accepted that finding. Because no plan has been proposed, it would be practically impossible for the federal government to prepare an impact statement for that "region;" analysis of all possible outcomes and infinite permutations is unavailing. The lack of a proposal that could be the subject of environmental study exposes the futility of providing respondents with the impact statement they seek. Moreover, even if a meaningful impact statement could be prepared, its completion would take several years, creating a period of delay detrimental to the efforts of this Nation to use coal as a replacement for imported oil.[22]

What is more, the court of appeals' decision implies that groups other than respondents would be able to compel the federal government to engage in "re-

[22] Assuming that such a statement could be prepared, the Department estimates that more than three years would be required to do so. A similar length of time was required for the *National Impact Statement*, which was commenced in June 1972 and completed in September 1975. If the Department were to undertake all of the comprehensive studies respondents have indicated are required (Br. in Opp. 18; App. 18–20) still more time would be consumed. And, of course, the adequacy of any impact statement finally prepared could become the subject of a challenge in the courts, adding still another level of delay of uncertain duration.

gional planning" or to issue "regional" impact statements with respect to regions defined by them, whether or not the government has engaged in activity that has peculiar effects upon that "region." Because there are a large number of potential "regions" available for such study the federal government may eventually be required to engage in multiple studies of different and overlapping combinations of "regions." We do not believe that NEPA requires this unproductive effort. We submit that the program of impact statements for the Nation as a whole, related groups of mines, and individual mines adequately fulfills the commands of Section 102(2)(C).

A. THE NEED FOR AN IMPACT STATEMENT IS DETERMINED BY THE SCOPE OF THE PROPOSED FEDERAL ACTION

Section 102(2)(C) of NEPA provides that federal agencies shall include "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, that proposal. "In order to decide what kind of an environmental impact statement need be prepared"—or, indeed, whether one need be prepared at all—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 322 (*SCRAP II*).

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As was the case in *SCRAP II*, the federal action being taken in this case is the approval of private applications to engage in private action. In *SCRAP II* the private action was the charging of particular rates for the transportation of commodities; here the private action is the mining of coal. In *SCRAP II* "the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads" (422 U.S. at 320). Here the government has made a proposal and a report on it by developing and adopting the Energy Minerals Activity Recommendation System, with respect to which it has prepared a national programmatic impact statement. Any additional proposals are requests by private mining companies that they be allowed to mine coal; no additional federal action takes place until a particular lease, right of way or mining plan is approved.[23]

When the government approves mining plans, leases or rights of way that will have significant effects upon the environment, it engages in a "major federal action" for the purposes of Section 102(2)(C) of NEPA. It has prepared and will continue to prepare impact statements accordingly. Moreover, the government also may be engaged in a separate "major federal action" by formulating and implementing the

[23] The authority for the program of mineral leases and mining on federal lands is the Mineral Leasing Act of 1920. This Act vests in the Secretary of the Interior the authority to make mine-by-mine decisions with respect to tracts of 40 acres each; no decision to allow or forbid mining on any particular tract commits the Secretary to allow or forbid mining on any other tract. See 30 U.S.C. 201(a).

national program structuring the discretion conferred by the Mineral Leasing Act and applying that program to particular mines. The government consequently has prepared a programmatic impact statement addressing the entire national coal leasing and mining program. The Department of the Interior, and other federal agencies, are committed to preparing similar programmatic impact statements whenever they propose programs of general applicability significantly affecting the quality of the human environment.[24] But none of this is the equivalent of any federal action with respect to any "region" of the country.

The district court found that the federal action pertained only to the nation as a whole and to individual mines. The court of appeals disagreed and concluded that the government is either "contemplating" or "attempting" to "control" the "development of the region" defined by respondents. See Pet. App. 2A, 33A,

[24] See generally the Council on Environmental Quality NEPA guidelines, 40 C.F.R. Part 1500. Although these guidelines do not bind agencies of the Executive Branch (see, *e.g.*, *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F. 2d 421, 424 (C.A. 5); *Ely* v. *Velde*, 451 F. 2d 1130, 1135–1136, n. 14 (C.A. 4); Pet. App. 23A, n. 22), petitioners agree with the Council (see 40 C.F.R. 1500.6 (d)) that when a number of related projects logically form a single plan or proposal they should be evaluated in a single impact statement. But this does not mean, as the court of appeals thought, that all projects "related" in some way necessarily form an integrated plan or proposal. There must be a programmatic relationship in the sense that all of the projects are part of a single plan for action; it is not enough that they simply have some feature in common (here, the only thing the private proposals have in common is that they all have to do with coal mining).

34A, 36A, 39A, 42A, 47A–50A. It is not entirely clear to us what the court of appeals means by its conclusion that the government's "role is one of controlling development of the region" (Pet. App. 47A–48A). That statement, of course, begs the question of what region is being "controlled." But what is more, it necessarily involves the untenable assumption that the coal mining program is "regional" in character, and that the only tasks for the court are to isolate the appropriate regions and to direct the government to prepare the appropriate regional impact statements.

The court of appeals neglected the district court's finding of fact that the federal coal program is national rather than regional in character (see pages 11–14, *supra*). The government simply is not attempting to control the development of particular regions; it is attempting to control the development of coal on federal lands, which are themselves scattered throughout the country. It applies the same decision making policy to private applications from any part of the country. Coal development creates "regional development" only because some federal land holdings are close to other holdings, and the effects of mining coal on some of these tracts may be felt on neighboring tracts and in non-federal areas nearby. That degree of interdependence, however, does not indicate that the federal policy is one of "controlling the development" of any "region."

The court of appeals disagreed with this analysis for two reasons: it thought that federal "attempts" and "contemplation" of "regional development" were

inescapably established because (1) the Northern Great Plains Resources Program "is the Government's attempt to formulate a regional program that will enable it to control development of the Northern Great Plains" (Pet. App. 36A); and (2) the government is accepting applications for leases, rights of way, and water option contracts in the Northern Great Plains, and is exercising its power to approve those applications (*id.* at 39A).

The first of these reasons overlooks the finding of the district court that the Northern Great Plains Resources Program is designed "to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). As the district court collectively described all of the federal studies of the Northern Great Plains (*id.* at 90A): "Those [studies] * * * are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy Act of 1969." In short, the existence of the Northern Great Plains Resources Program simply demonstrates that the federal government is deeply interested in the local effects of its national policies. Such a show of interest, however abiding the interest may be, is not the equivalent of the creation of a plan or the institution of a major federal action. The contrary conclusion of the court of appeals lacks any support in the record of this case and seems to contradict not only the findings of district court but also the con-

cessions of respondents, who have repeatedly (see pages 11, 15, *supra*) urged that there is no federal plan or proposal with respect to the Northern Great Plains region defined by them.[25]

The second reason advanced by the court is no more persuasive. Private requests for federal approval, no matter how numerous, are not federal action. See *SCRAP II, supra,* 422 U.S. at 320–321. Here, of course, some of the requests have been granted, and to that extent federal action has occurred with respect to each grant. This does not become "regional" action, however, simply because some of the coal mines are geographically located within a single "region." It is meaningless to say that all coal mines located inside any arbitrary boundary are within that "region." Such a boundary can be drawn around any mine or number of mines; the larger the territory enclosed by the boundary, the more mines or tracts of federal land will be inside. But the fact that a plaintiff can draw such a boundary to enclose numerous federal actions does not indicate that those actions are being taken on a "regional" basis or are being guided by a "regional" plan. The only foundation for the court of appeals' conclusion that the boundary drawn by

[25] We submit that the major effect of the reasoning of the court of appeals in this regard would be to discourage federal agencies from engaging in sophisticated studies like the Northern Great Plains Resources Program, lest a court seize upon the study as support for a conclusion that the agency is "contemplating" or "attempting" major federal action with respect to the region studied. If that is the effect of the decision of the court of appeals, then environmental planning has suffered a setback in this case.

respondents enclosed an appropriate "region" was the existence of the Northern Great Plains Resources Program [26] and, as we have demonstrated, inferring a regional plan or proposal from the existence of that study is unwarranted.

B. FEDERAL APPROVAL OF PARTICULAR LEASES AND MINING PLANS DOES NOT SO "IRRETRIEVABLY COMMIT" REGIONAL RESOURCES THAT A REGIONAL IMPACT STATEMENT IS NECESSARY

As the district court found, the only pertinent federal actions are the creation of the national coal program and the approval of particular leases, mining plans, rights of way and water rights. It should follow directly from this fact and from our analysis to this point that a regional impact statement is unnecessary. The court of appeals apparently concluded (see Pet. App. 37A–41A and nn. 28, 29), however, that the approval of *any* mining within the "region" defined by respondents so involves the federal government in the "development" of that "region" that a "regional" impact statement must be prepared.[27] Put in this

[26] Even if the court of appeals were correct in drawing such an inference, it would not support a finding that the "Northern Great Plains region" defined by respondents is a relevant region for environmental study. The Northern Great Plains Resources Program considered the Northern Great Plains Coal Province, a region larger than respondents' proposed region. Compare Pet. App. 2A with *id.* at 88A.

[27] The court of appeals relied upon *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F. 2d 1079 (C.A.D.C.) (*SIPI*). Although we do not contest the result

form, the conclusion of the court of appeals has been rejected by at least four other courts of appeals, which have held that it is permissible to subject to environmental scrutiny less than all of some larger and "related" whole, so long as the impact statement for the project under scrutiny fully analyzes all of the environmental effects of that project.[28]

Section 102(2)(C) of NEPA provides that an impact statement must thoroughly assess, among other things, "any adverse environmetal effects which cannot be avoided should the proposal be implemented" and "any irreversible and irretrievable commitments

of *SIPI* on its own facts, it does not support the decision of the court of appeals in this case. As Judge MacKinnon pointed out (Pet. App. 61A): "The crucial consideration which justified the requirement of a statement covering more than an individual project in * * * *SIPI* * * * was the presence of irretrievable commitments of resources beyond what was actually expended in an individual project. In *SIPI* each development in the Liquid Metal Fast Breeder Reactor Program made it more unlikely that the agency could in the future abandon its investment in favor of some alternative energy source * * *." In this case, however, approval of mining at one location does not commit the government to approve mining elsewhere, or even make such approval more likely. Although mining is bound to increase, the cause of that increase is the nationwide demand for coal, not the actions of the government in granting the initial leases. See also pages 38–39, *infra*.

[28] See *Sierra Club* v. *Callaway*, 499 F. 2d 982 (C.A. 5); *Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11 (C.A. 8); *Friends of the Earth* v. *Coleman*, 513 F. 2d 295 (C.A. 9); *Trout Unlimited* v. *Morton*, 509 F. 2d 1276 (C.A. 9); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275 (C.A. 9); *Sierra Club* v. *Stamm*, 507 F. 2d 788 (C.A. 10). See also *Cady* v. *Morton*, C.A. 9, No. 74–1984, decided June 19, 1975, which holds that the appropriate unit for environmental study is a single mining lease.

of resources which would be involved in the proposed action should it be implemented." The court of appeals wrote that approval of a single mining plan requires preparation of a "regional" impact statement because (Pet. App. 38A, n. 28) "development of one mine is considerably more than an irretrievable commitment to that mine." The court went on to suggest two ways in which that is so: development of one mine requires water that consequently cannot be used to bring an alternative mine to production, and development of any mine "creates pressure for a population influx" (*ibid*). Even if one assumes *arguendo* that both of these factual assertions are correct,[29] they do not establish the sort of "regional" effects that would require a "regional" impact statement.

We submit that the court of appeals has confused two lines of inquiry. We do not question the requirement that all of the environmental effects of each mine must be analyzed. Some of those effects will reach well beyond the confines of the tract upon which the mine is operated. The full effects of diversion of water, the influx of people to the tract, and so on, must be assessed. But the effects, even (within reason) the far-flung effects, of a single mine or group of mines[30] are one thing; the effects of "developing the region" by

[29] Neither assertion has any support in the record of this case.

[30] The complex task of making such an assessment often makes it advantageous to evaluate the effects of a number of mines in a single statement, as was done in the Eastern Powder River Basin environmental impact statement, which covers an area containing more than one third of the coal economically recoverable by surface mining in the Northern Great Plains.

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allowing more extensive mining are something else entirely. Only the former are "irretrievable commitments" of resources, or effects that "cannot be avoided" in the coal production of a single mine. Accordingly, only the former need be discussed in the impact statement for a particular mine.

We therefore believe that Judge MacKinnon correctly answered the majority's argument by observing that "[t]his record is devoid of the type of commitment of 'regional' resources" that would justify a "regional" impact statement (Pet. App. 63A). Judge MacKinnon went on (*id.* at 63A–64A; footnote omitted):

> For example, the decision to permit mining of sub-bituminous coal in Wyoming to which the Federal government has the mineral rights, in no way commits Interior to approving proposals for mining lignite, similarly owned by the United States, in North Dakota. Even within each of the Basins which comprise the Region, development of some portion of the coal reserves does not irretrievably commit the federal agencies to permit development of the entire reserve. * * * It may indeed be the case that widespread development of this area will eventually occur, but the impetus for that development will come from the nation's need for coal and not from the fact that partial development of the region has been allowed.

The court of appeals relied heavily upon *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F. 2d 927 (C.A. 2), in support of its holding that an impact statement for even a

"local" project must assess the effects of "regional" development (see Pet. App. 26A, 28A–29A, 38A, n. 28, 46A–47A, n. 34). *Conservation Society* had held that an impact statement discussing the effects of building 280 miles of four-lane highway must be prepared before construction could commence on 20 miles of two-lane highway, even though no plan existed for constructing the entire 280 miles of superhighway. On our petition for certiorari, this Court vacated and remanded *Conservation Society* (No. 74–1413, decided October 6, 1975), and on remand the Second Circuit now has reversed its initial decision. The new opinion recognizes that the "federal action" related only to the 20 miles of highway that had been proposed for construction. Accordingly, the court wrote, the federal action did not irreversibly or irretrievably commit federal funds or resources to the construction of a highway for the entire corridor, and there was no need to prepare an environmental impact statement for the entire corridor. The disposition on remand in *Conservation Society* strongly supports the position we have taken here.[21]

C. A REGIONAL IMPACT STATEMENT IS NOT REQUIRED IN THE ABSENCE OF A REPORT OR RECOMMENDATION ON A PROPOSAL FOR REGIONAL FEDERAL ACTION

Even if the court of appeals were correct in concluding that major federal action is "contemplated"

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[21] For the convenience of the Court we have reproduced the opinion on remand in *Conservation Society* as an appendix to this brief.

with respect to the Northern Great Plains as a "region,"[32] it would not follow that an impact statement is required either now or at such time as the court's four "ripeness" factors would indicate.

The court of appeals described in several ways the time at which an impact statement would be required. It asserted that the impact statement must accompany the proposal for federal action (Pet. App. 3A, 48A) and that an impact statement must precede any recommendation or report on a proposal for federal action (*id.* at 42A, 47A, n. 35). Although its statements concerning the appropriate time are not entirely consistent, their tenor is that an impact statement must be produced as early as possible during an agency's consideration of possible action, before the agency commits itself, "even tentatively, to action" (*id.* at 42A). The four "ripeness" factors enumerated (Pet. App. 43A) and "balanced" (*id* at 44A–50A) by the court are evidently designed to enforce the court's timing preferences.

[32] Although the conclusion of the court of appeals (Pet. App. 34A) that "the federal [petitioners] have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains" is unsupported by the record, it would be accurate to conclude that petitioners "contemplate" regional planning (although not necessarily for the region defined by respondents) because, as the district court found (Pet. App. 94A), and as the *National Impact Statement* confirms, "[i]t is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available [to petitioners] may indicate that statements on smaller subregions, geologic structures, basin, or selected individual actions" will be preferable.

But NEPA itself does not contain similar ambiguity about timing, and it does not establish a "balancing" of factors indicating "ripeness" against those of contrary purport. Section 102(2)(C) provides that the agency shall include a final impact statement "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment. The statutory language states in the clearest terms that the final statement must accompany the recommendation or report.[33] Until there has been a "proposal," and until there has been a "recommendation or report" on that proposal, there is no need for an impact statement. As the Court held in *SCRAP II, supra*, 422 U.S. at 320 (emphasis in original), the quoted sentence of NEPA means that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action."[34] It is undisputed that there has been no proposal for a regional plan, program or project with respect to the Northern Great Plains (see pages 11–15, *supra*). Nor has there been a rec-

[33] The point in the decision making process at which the agency makes the recommendation or report will, of course, be determined by the agency.

[34] The rather meagre legislative history of NEPA confirms that the statutory language was intended to have its ordinary meaning. The bill passed by the House did not contain an impact statement requirement. See H.R. Rep. No. 91–378, 91st Cong., 1st Sess. (1969). The impact statement provision in the Senate bill was described (S. Rep. No. 91–296, 91st Cong., 1st Sess. 20–21 (1969)) as requiring any agency "which proposes any major actions" to determine "whether the proposal would have a significant effect upon

onmendation or report by petitioners on such a proposal for federal action. The time for a regional impact statement consequently has not arrived—and it may never arrive.

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the quality of the human environment": and, if "the proposal is considered to have such an effect, then the recommendation or report supporting the proposal" must include findings that, among other things, "the environmental impact of the proposed action has been studied," adverse environmental effects "cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the proposal," and whenever "proposals involve significant commitments of resources" that are "irreversible and irretrievable," such "commitments are warranted." The committee emphasized the need for a "proposal" even more emphatically than does the text of the statute.

The conference report (H.R. Conf. Rep. No. 91–765, 91st Cong., 1st Sess. 8 (1969)) is to a similar effect. The managers on the part of the House observed that Section 102 generally is "based on * * * the Senate bill" because there "was no comparable provision in the House amendment," and stated that subsection (2)(C) requires every agency to "include in every recommendation or report on proposals for legislation or other major Federal actions a detailed statement * * * on the environmental impact of the proposed action, any adverse environmental effects which can not be avoided should the proposal be adopted, [and] alternatives to the proposed action * * *."

No contrary understanding of NEPA is reflected in the floor debates upon the bills; the court of appeals and respondents have cited none. The bill initially passed the Senate without debate, 115 Cong. Rec. 19008–19013 (1969). Before sending the bill to conference, however, the Senate made certain amendments. During the course of the debate on these amendments several Senators demonstrated an understanding that impact statements were to be prepared for inclusion in reports or recommendations and were to discuss the environmental effects of the proposals thus reported upon. *Id.* at 29052–29053, 29055, 29058. The House bill, which was received in the Senate during these debates, precipitated similar references. *Id.* at 29068, 29085. The House agreed to the conference report without recorded objection (*id.* at 40923–40928).

D. NEPA DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO ENGAGE IN "REGIONAL PLANNING"

Quoting *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 836 (C.A.D.C.), the court of appeals thought the language used in that opinion, "[v]iewed broadly," imposes a requirement under NEPA that the government engage in "comprehensive planning" (Pet. App. 30A–31A). The court continued (*id.* at 31A):

> Agency violation of this substantive duty by a failure to improve its plans or coordinate its actions might justify a judicial directive to coordinate various major federal actions into one comprehensive major federal action, followed by a directive ordering issuance of a comprehensive impact statement for that newly-comprised action.

While the court therefore approved "in theory" (*id.* at 31A–32A) respondents' argument that NEPA requires the federal government to engage in "regional planning," the court stated that it was not deciding the case on that ground because here the federal government is contemplating regional development (*id.* at 32A–33A).

It is difficult to credit the court's disclaimer of the foregoing reasoning as a basis for its decision. Even if an impact statement sometimes must be issued when federal agencies are "contemplating" action, and even if such a statement must assess the environmental impacts of all "related" activities throughout the rele-

vant "region," the choice of the relevant region is, in the first instance, for federal officials, to be upset only if their choice is arbitrary, capricious, or an abuse of discretion. If the court agreed with these principles, as it stated that it did (Pet. App. 31A, n. 26; 32A; 45A–46A, n. 33; 48A, n. 36), how then could the court conclude that it was an abuse of discretion to select for scrutiny the Eastern Powder River Basin, an area containing more than a third of the coal reserves economically recoverable by surface mining in the northern Great Plains? The court of appeals did not explain why it was an abuse to select for "regional" study an area other than the "Northern Great Plains Region" defined by respondents. We do not think this omission can be explained unless the court was, in fact, compelling the government to engage in "regional" planning more broadly defined, the very course it purported to eschew (*id.* at 30A–32A).

If an agency is required to engage in such planning, it would be required to prepare an impact statement whenever any agency made a report of recommendation on the proposed regional plan. Thus, under the analysis of the court of appeals, a regional impact statement would be required. We submit, however, that this bootstrap argument finds no support in NEPA.

Section 102(2)(C) itself plainly contains no requirement of regional planning. It simply provides that, when a report or recommendation is made on a proposed plan, the report or recommendation must be

accompanied by an impact statement. It does not require the creation of any plan, let alone a "regional" plan. The Mineral Leasing Act, under which federal agencies grant coal leases and approve mining plans, contains no requirement of regional planning; that Act provides for the approval of actions on a tract-by-tract basis. 30 U.S.C. 201(a). NEPA does not amend or repeal by implication any other federal statute (see *United States* v. *SCRAP*, 412 U.S. 669, 694 (*SCRAP I*)) and it does not do so with respect to the national program created by the Mineral Leasing Act.

NEPA does contain several provisions that might be thought to require comprehensive or systematic environmental consideration. Section 101(b) declares that it is federal policy to "improve and coordinate Federal plans" in order better to consider environmental consequences. Section 102(2)(A) requires federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences"; Section 102(2)(B) requires federal agencies to "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration"; Section 102(2)(E)[35] requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action * * *." Although the language of Section 101 appears to be precatory,

[35] 42 U.S.C. (1970 ed.) 4332(2)(D) (Section 102(2)(D)) was renumbered as Section 102(2)(E) by Pub. L. 94–83, 89 Stat. 424.

the requirements of Section 102 apply independently of the impact statement requirement of Section 102(2)(C). *Trinity Episcopal School Corp.* v. *Romney,* 523 F. 2d 88, 93 (C.A. 2).

The district court held (Pet. App. 98A–100A) that petitioners have complied with these requirements, and the court of appeals did not disturb those findings. But even if these sections create a requirement of comprehensive "planning,"[36] they manifestly do not require that this planning be carried out on a "regional" basis, or that the region defined by respondents be forced upon the government as the appropriate region for such comprehensive study.[37]

[36] The court of appeals did not justify its apparent leap from the NEPA requirement of comprehensive study and analysis to a requirement of "planning." Even Section 101 of NEPA, which declares a policy "to improve and coordinate Federal plans," does not indicate that plans must be created solely in order that they can be "improved" and "coordinated." The leap from "study" to "planning" was necessary to the court's conclusion, however, because in the absence of a recommendation or report on a "plan" or proposal, there is no need for an impact statement.

[37] We also believe that a requirement of "regional planning" would be impractical. NEPA contains no guidelines that would help either an agency or a court select an "appropriate" region for planning. Consequently, no matter what region the agency selected, it always would be open for litigants or the courts to second-guess the agency in an essentially standardless fashion. As Judge MacKinnon observed (Pet. App. 71A), such an interpretation of NEPA "could result in the generation of an infinite progression of comprehensive plans which would have to be justified by comprehensive impact statements. It seems obvious that NEPA was enacted as a means of facilitating agency decision making and not as a means of paralyzing the federal government." Even the majority of the court of appeals noted that its interpretation of NEPA would produce what it referred to as "practical difficulties" (*id.* at 31A).

There is no principled ground upon which the court of appeals could decline to accept the judgment of the responsible federal agencies concerning the appropriate way in which comprehensive analysis should be carried out. In this case a national coal program has been formulated and a national programmatic impact statement has been issued. When local groups of mines are intimately related in a region defined by common natural characteristics, federal officials will prepare a "regional" impact statement, as was done for the Eastern Powder River Basin, a formation containing more than one third of the coal economically recoverable by surface mining in the Northern Great Plains Province. The court of appeals, although acknowledging the unanimous holdings of other federal courts that the choice of federal officials in this regard may be disregarded only if it is arbitrary, capricious or an abuse of discretion (see Pet. App. 31A, n. 25; 32A; 45A–46A, n. 33; 48A, n. 36),[38] apparently thought it arbitrary and capricious to select the Nation as a whole for "comprehensive" study and the Eastern Powder River Basin for "regional" study. The court of appeals articulated no reason for this holding, and we know of none.

In many ways, if "comprehensive" planning is required by NEPA, this case is controlled by an aspect *SCRAP II,* in addition to the timing requirements we have already discussed. In *SCRAP II* the Inter-

[38] Cf. *Pauling* v. *McNamara,* 331 F. 2d 796 (C.A.D.C.) (Burger, J.), certiorari denied, 377 U.S. 933.

state Commerce Commission, presented by private railroads with a request for an across the board rate increase, had elected to discuss in that proceeding only the marginal environmental effects of the increase, delegating to another proceeding the full environmental analysis of the rate structure. The Court (422 U.S. at 325–326) expressly approved that division of analysis, concluding that NEPA does not empower reviewing courts to substitute their planning judgment for that of the agencies with statutory jurisdiction and relative expertise. In this case the responsible federal agencies have elected to conduct an overall, national analysis of the effects of the coal leasing program; that analysis has been completed. The federal agencies have left the analysis of specific mines or groups of mines to separate statements. Here, as in *SCRAP II*, the overall plan, program or action has been given separate environmental attention, and it is appropriate for the responsible agencies to proceed in individual impact statements to analyze the marginal environmental effects of specific projects or proposals.

E. EVEN IF A "REGIONAL" ENVIRONMENTAL IMPACT STATEMENT MUST BE PREPARED, INDIVIDUAL PROJECTS THAT HAVE RECEIVED FULL ENVIRONMENTAL STUDY CAN PROCEED

Without explaining the basis upon which it did so, the court of appeals enjoined further federal action with respect to the mines discussed in the Eastern Powder River Basin impact statement. The court of

appeals apparently believed that, even though the adequacy of the Eastern Powder River Basin impact statement has never been challenged, the projects discussed in that statement could not go forward until an appropriate "regional" impact statement has been prepared. We have argued above that NEPA does not require an impact statement for the "Northern Great Plains region" defined by respondents. If the Court disagrees with this submission, it will be required to decide whether individual projects within the Northern Great Plains can be undertaken during the time needed to complete the "regional" impact statement. We submit that there is no reason to delay action on projects the environmental effects of which have been fully scrutinized.

The need for a "regional" impact statement and the need for an impact statement on a particular mine or group of mines are logically distinct. A "regional" impact statement would address the long-term, synergistic effects of many mines operating within the region. Allowing mining to go forward at a few particular mines the environmental effects of which have been fully studied will not hinder the ability of the government to conduct a regional study and will not diminish the usefulness of the regional study once completed. The broader study still could furnish information helpful in making future decisions. For these reasons at least two courts of appeals have explicitly allowed particular projects to proceed while more comprehensive impact statements were being pre-

pared. *Cady* v. *Morton*, C.A. 9, No. 74-1984, decided June 19, 1975 (allowing mining to proceed under a fully-analyzed mining plan pending preparation of an impact statement for a much larger mining lease); *Citizens for Balanced Environment and Transportation, Inc.* v. *Volpe*, 503 F. 2d 601 (C.A. 2), certiorari denied *sub nom. Citizens for Balanced Environment and Transportation, Inc.* v. *Coleman*, No. 75-255, October 6, 1975 (allowing construction to proceed on a segment of a highway pending preparation of the impact statement that had been required by another panel of that court in *Conservation Society, supra*).

We submit that, as a general rule, individual federal actions of independent utility should be allowed to proceed once their individual environmental effects have been fully analyzed, even though it might also be necessary to prepare an impact statement concerning a larger "whole" of which the individual action is a part."[39] No valid interest is served by allowing

[39] With the exception of the opinion below and of the now withdrawn opinion in *Conservation Society, supra*, the courts of appeals have held that a project with independent utility should not be enjoined pending preparation of an impact statement covering a general plan of greater dimensions. See *Sierra Club* v. *Callaway, supra*, 499 F. 2d at 987, 990; *Indian Lookout Alliance* v. *Volpe, supra*, 484 F. 2d at 19; *Daly* v. *Volpe*, 514 F. 2d 1106, 1110 (C.A. 9); *Sierra Club* v. *Stamm, supra*. Cf. *Nucleus of Chicago Homeowners Association* v. *Lynn*, 524 F. 2d 225 (C.A. 7), petition for a writ of certiorari pending *sub nom. Nucleus of Chicago Homeowners Association* v. *Hills*, No. 75-951; *Trinity Episcopal School Corp.* v. *Romney*, 523 F. 2d 88, 93 (C.A. 2); *Swain* v. *Brinegar*, 517 F. 2d 766, 766, n. 12 (C.A. 7).

Some of these courts have indicated that, if a project has "independent utility," this fact alone demonstrates that there need not be an impact statement covering the larger plan of which the individual project is a part. We do not necessarily endorse this view; we believe that it is more appropriate to look to the language of NEPA to determine when an impact statement is necessary and what the appropriate scope of that statement should be. The "independent utility" test does indicate, however, that in the view of these courts individual projects should be allowed to go forward, regardless of their relationship to some other plan, when they would be built or adopted whether or not the larger plan reaches fruition and whether or not an impact statement is required with respect to that larger plan.

a particular project of independent utility—a project which is desired because of that utility and not because of its relationship to some larger project, and the environmental effects of which are fully understood—to be held hostage by objections to some "regional" plan that has yet to be proposed or analyzed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1976.

APPENDIX

United States Court of Appeals for the Second Circuit

Nos. 63, 288—September Term, 1975
(Submitted December 10, 1975—

Decided February 18, 1976.)

Docket Nos. 73–2629, 73–2715

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC.; BERNARD G. WINSLOW, LEON R. ELDRED, ANSTISS H. ELDRED and WALLACE E. VAN KEUREN, individually and as members of THE CONSERVATION SOCIETY OF SOUTHERN VERMONT; LAWRENCE WASCO and RUTH WASCO, and THE VERMONT ASSOCIATION OF RAILWAY PASSENGERS, APPELLEES

v.

SECRETARY OF TRANSPORTATION; H. JAMES WALLACE, FRANK A. BALCH, HENRY O. ANGELL, ROBERT S. BIGELO, and H. GORDON SMITH, in their capacities as members of the VERMONT STATE HIGHWAY BOARD; JOHN T. GRAY, Commissioner of Highways, State of Vermont; and DAVID B. KELLEY, Division Engineer, Federal Highway Administration, APPELLANTS

Before MOORE, MULLIGAN and ADAMS,* *Circuit Judges.*

On remand by the Supreme Court of prior opinion in light a new addition to a federal statute and a re-

*Of the Third Circuit Court of Appeals, sitting by designation.

201-684—76——5

cent Supreme Court case. Prior opinion and district court opinion both reversed.

HARVEY D. CARTER, JR., Bennington, Vermont (Williams, Witten, Carter & Wickes, Bennington, Vermont), *for Appellees.*

ROBERT C. SCHWARTZ, Asst. Attorney General, Vermont, Montpelier, Vermont: Walter Keichel, [*sic*] Jr., Acting Asst. Attorney General, Edmund B. Clark, Kathryn A. Oberly, Attorneys, Department of Justice, Washington, D.C., *for Appellants.*

SARAH CHASIS, New York, New York, of Counsel, *for Amici Curiae Natural Resources Defense Council, Inc.*

ARTHUR J. O'DEA, Manchester, Vermont, *for Amicus Curiae, Town of Manchester.*

PER CURIAM:

On December 11, 1974 this court rendered its opinion in *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F. 2d 927, which affirmed a judgment of the District Court of Vermont reported in 362 F. Supp. 627 (1973). The Solicitor General petitioned for and was granted a writ of certiorari. On October 6, 1975, this court's prior judgment was vacated and the case was remanded for further consideration in light of Public Law 94–83 and *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289 (1975). 96 S. Ct. 19. The reported opinions fully set forth the facts involved in this litigation and they will not be repeated here except as relevant to the remand.

In *Conservation Society of Southern Vermont* v. *Secretary of Transportation, supra,* this court reaffirmed the rule it announced in *Greene County Planning Board* v. *FPC,* 455 F. 2d 412, cert. denied, 409 U.S. 849 (1972) which required that an Environmental Impact Statement (EIS) sufficient to comply

with the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA) had to be prepared by the responsible federal agency and not by a state agency. As a result of this decision, the Federal Highway Administration (FHWA) initially ordered an almost total halt to all federally funded highway projects in the three states of this Circuit, and the states themselves have refrained from committing additional funds until the issue was finally decided. In response to our decision in *Conservation Society,* the Congress enacted Public Law No. 94–83 which added a new section 102(2)(D) to NEPA.[1]

The legislative history of the enactment makes it clear that the Congress intended to overturn our de-

[1] "Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

"(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

"(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

"(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."

cision in *Conservation Society*. 1975 U.S. Code Cong. & Admin. News 1797, quoting from Senate Rep. 94–52 at 2. Indeed in the District Court Judge Oakes had earlier suggested that delegation of authority to prepare the EIS to the responsible state agency as an issue that should be taken to Congress. 362 F. Supp. at 631. Under the law as amended the state agency may prepare the EIS provided the federal agency "furnishes guidance and participates in such preparation" and provided "the responsible Federal official independently evaluates such statement prior to its approval and adoption." Judge Oakes's findings in the District Court establish that the appropriate federal official "maintained frequent contact" with state officials in the preparation of the EIS, and was in verbal communication two or three times weekly with the state official primarily responsible for the preparation of the EIS; the FHWA division engineer undertook a field trip to examine the proposed route, during which environmental considerations were noted and discussed. 362 F. Supp. at 629. Although the state agency prepared the EIS it was in consultation with FHWA; the draft was submitted to FHWA at its offices in both Vermont and New York. *Id.* at 630. It was reviewed by the FHWA regional office, the division office, the federal planning engineer and the federal area engineer; it was circulated by the regional office to an interdisciplinary task force which made three suggestions, all of which were incorporated in the final EIS. The District Court concluded that the EIS was prepared by the local state agency "with communication from and cooperation of the regional FHWA, followed by review by an FHWA 'task force' at the regional level . . . ." *Id.* at 630.

These findings have not been appealed and we conclude that there was compliance with the procedural

requirements of Public Law No. 94–83. In our prior opinion we noted that "the district court found that substantively the EIS was adequate. There is no appeal from this aspect of the district court opinion." 508 F. 2d at 929 n.6.[2]

We also affirmed the holding of the district court that an EIS be prepared for the entire 280-mile length of Route 7 even though no plan then existed for constructing the superhighway through Connecticut, Massachusetts and Vermont. 508 F. 2d at 934–36. The Supreme Court remand here cites *SCRAP*, *supra*, which holds that a federal agency must prepare its EIS at "the time at which it makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis in original). Here the findings of the district court were that, although federal officials had knowledge of the overall planning process of state officials, there was "no overall federal plan" for improving the corridor into a superhighway. 362 F. Supp. at 636. The federal action being taken here relates only to the twenty-mile stretch between Bennington and Manchester in Vermont. The stretch is "admittedly a project with local utility," 508 F. 2d at 935. Hence we see no irreversible or irretrievable commitment of federal funds for the entire corridor and under *SCRAP* no obligation for a corridor EIS. See *Friends of the Earth* v. *Coleman*, 513 F. 2d 295, 299–

[2] We point this out since appellees argue that FHWA evaluation was pro forma because the EIS was substantively deficient. They also mention that despite the findings of the district court which we have noted, that court characterized the final comments of FHWA as "perfunctory" and a "rubber stamp." 362 F. Supp. at 631. We note however that the court was applying the strict nondelegation rule of *Greene County*, *supra*, now rejected by congressional action.

300 (9th Cir. 1975); *Trout Unlimited* v. *Morton*, 509 F. 2d 1276, 1283–85 (9th Cir. 1974).

In light of the remand and this discussion, we reverse our prior decision and reverse the judgment of the district court.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

v.

SECRETARY OF TRANSPORTATION, ET AL., APPELLANTS IN No. 73–2629

THE VERMONT NATURAL RESOURCES COUNCIL, INC., ET AL., APPELLANTS

v.

CLAUDE S. BRINEGAR, ET. AL., No. 74–2168

ADAMS, *Circuit Judge* (dissenting in part):

There can be no doubt that the Court's previous decision in this matter (*Conservation Society I*)[1] was the impetus for the congressional action that resulted in the addition of a new section 102(2)(D) to the National Environmental Policy Act (NEPA).[2] But my understanding of the intent of the Congress, as it is expressed in the amendatory language and illuminated by the legislative history, diverges from that of the majority. In my view, the legislative purpose was to modify and clarify the rigid standard that Congress perceived *Conservation Society I* had established for federal involvement in the preparation and drafting of the environmental impact statement (EIS). The intent was not simply to overturn that ruling or to repudiate altogether the requirement of substantial federal control of the EIS. Because it is

[1] *Conservation Society* v. *Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974).

[2] Act of Aug. 9, 1975, Pub. L. No. 94–83, 89 Stat. 424.

clear that the degree of federal control mandated by the modified statute has not been exercised in this case, I respectfully dissent from that portion of the majority opinion addressing the effect of the amendment to NEPA.

The roots of the question now before the Court find their grounding in *Greene County.*[3] Construing the requirement of NEPA that an EIS be prepared "by the responsible federal official,"[4] this Court there held that the statute prohibited the federal agency from delegating to a state agency the duty to prepare and draft the EIS. A major risk of such a procedure, specifically mentioned by the *Greene County* Court, is that the state agency's own interest in completion of the project in question might result in a biased EIS, one "based upon self-serving assumptions."[5]

Notwithstanding the refusal of five other courts of appeals to follow the *Greene County* rule,[6] this Court adhered to it when the issue was again presented in *Conservation Society I.*[7] The lack of objectivity that might result from permitting the state agency to prepare the EIS was again put forward as one of the bases for the Court's decision.[8]

In response to *Conservation Society I*, Congress amended NEPA by adding a new section 102(2)(D).

[3] *Greene County Planning Bd.* v. *FPC*, 455 F. 2d 412 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972).

[4] NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970).

[5] 455 F. 2d at 420 (footnote omitted).

[6] *See* 508 F. 2d at 929 n. 3.

[7] Since the date of that decision, two other federal courts have adopted the *Greene County* rule. *Swain* v. *Brinegar*, 517 F. 2d 766, 778–79 (7th Cir. 1975); *Appalachian Mountain Club* v. *Brinegar*, 394 F.Supp. 105, 120–21 (D.N.H. 1975). *See also I–291 Why? Ass'n* v. *Burns*, 517 F. 2d. 1077, 1081 (2d Cir. 1975) (per curiam).

[8] 508 F. 2d at 931–32.

It provides that an EIS shall not be deemed insufficient solely because it was prepared by a state agency if "the responsible Federal official furnishes guidance and participates in such preparation [and] . . . independently evaluates such statement prior to its approval and adoption . . . ."[9] The Supreme Court's order vacating our prior judgment and remanding the case[10] places the meaning of the amendment to NEPA squarely before us.

A.

My analysis begins with the particular language Congress employed to amend NEPA. The amendment concerns only the preparation of the EIS; it does not affect the requirement of section 102(2)(C) of NEPA that the EIS be formally adopted by the federal official. It appears to permit an EIS to be prepared by a state agency if the federal agency discharges three specific responsibilities. The federal agency must (1) furnish guidance in the preparation of the EIS, (2) participate in the preparation of the EIS, and (3) independently evaluate the EIS prepared by the state agency before approving and adopting it. These three requirements indicate that the federal agency must remain involved in a substantial way both during and after the state agency's preparation of the EIS. To the same end, the amendment includes the statement that "[t]he procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire [EIS] or of any other responsibility under [NEPA] . . . ."

[9] NEPA § 102(2)(D)(ii), (iii), Act of Aug. 9, 1975, Pub. L. No. 94–83, 89 Stat. 424. Other aspects of the amendment are not relevant to the question before the Court.

[10] 44 U.S.L.W. 3199 (U.S. Oct. 6, 1975).

To the extent that *Greene County* and *Conservation Society I* place an absolute prohibition upon delegation to the state agency of responsibilities to prepare the EIS, they have now been overruled by Congress. But my understanding of the congressional language is that a continuing and vital role by the federal agency in the preparation of the EIS is still contemplated.

B.

The meaning of the amendment is further clarified by a review of its legislative history. The Supreme Court has admonished that it is essential for courts to "place the words of a statute in their proper context by resort to the legislative history,"[11] since such history "illuminates the meaning of acts, as context does that of words."[12] The content of the extensive floor debates and of the reports submitted to the two chambers of Congress by their respective committees reinforces the conclusion that the statutory language itself requires major federal involvement in the preparation of the EIS.

Because committee reports are entitled to greater weight in statutory construction than are discussions on the floor of the Senate or the House,[13] initial reference to the reports written in connection with the amendment to NEPA would appear to be in order.

The report of the House Committee on Merchant Marine and Fisheries was the first one dealing with the matter.[14] The Committee reported favorably on

[11] *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972).

[12] *Cramer* v. *United States*, 325 U.S. 1, 33 (1945).

[13] *United States* v. *United Auto Workers*, 352 U.S. 567, 585 (1957).

[14] H.R. Rep. No. 144, 94th Cong., 1st Sess. (1975) [hereinafter cited as House Report].

H.R. 3130, the bill which was ultimately enacted.[15] At the same time, it recommended against passage of H.R. 3787,[16] a bill that had also been introduced in response to *Conservation Society I*. The report specifically accompanied only H.R. 3130 to the floor, although it also made references to H.R. 3787.

As reported out of Committee, H.R. 3130 had provisions virtually identical to those now contained in section 102(2)(D) of NEPA. "The purpose of the bill," the Committee wrote, "is to *clarify* the application" of NEPA to projects in which the state agency has prepared the EIS.[17] The Committee's understanding of the critical phrase "furnishes guidance and participates in" was that it demonstrates an intent to "reemphasize the basic precept of NEPA that Federal officials consider the environmental ramifications of proposed federal actions." [18] In the committee's view, federal participation both extensive and effective is required in the drafting of the EIS.[19] The phrase "independently evaluates" is "intended to assure that the Federal agency consider, critically review and, when appropriate, change and supplement" the work done by the state agency.[20] This analysis of the bill's provisions led the Committee to the conclusion that the bill would not disturb the "basic logic" of *Greene County* [21]——that delegation must be sufficiently

[15] *Id.* 1.

[16] *Id.* 2–3.

[17] *Id.* 1–2 (emphasis added). The same view was expressed throughout the report. *See, e.g., id.* 4.

[18] *Id.* 4–5.

[19] *Id.* 5.

[20] *Id.*

[21] *Id.* 6.

limited to maintain federal accountability for decisions that affect the environment.

Summarizing its understanding of the bill, the House Committee used the following forceful language:

> [The bill] does not sanction a "rubber stamp" approach to Federal responsibilities, nor does it allow Federal functionaries to sidestep the other responsibilities placed upon them by law including, but not limited to, NEPA. What it does is to encourage adequate inputs of information by those best suited to develop that information, and to ensure that a continuing federal presence is mandated to fit that information into a rational and realistic planning and decisionmaking process. If enacted, H.R. 3130 would have this, *and only this*, effect.[22]

The Senate Committee on Interior and Insular Affairs issued a report that made the same recommendations as the House Report.[23] The Senate Committee considered the purpose of H.R. 3130 to be the remedying of "administrative difficulties arising from" *Conservation Society I*.[24] The major administrative difficulty identified in the report is "the extent of permissible delegation of EIS preparation duties by the Federal agencies . . . ." [25] Nowhere in the report is it suggested that total, or even major delegation to state agencies be allowed; on the contrary, the importance of a continuing federal role is emphasized throughout.

[22] *Id.* (emphasis in original).

[23] S. Rep. No. 152, 94th Cong., 1st Sess. (1975) [hereinafter cited as Senate Report].

[24] *Id.* 2.

[25] *Id.* 3.

Express approval was given by the Senate Committee to the language of the House Report rejecting the notion that the bill allowed a "rubber stamp" approach to the responsibilities of the federal agency.[26] Emphasizing the importance of the role of the federal agency in the preparation of the EIS, the committee concluded that "[t]he involvement of the Federal official should come early and at every critical stage in the preparation of the EIS, and should be substantial and continuous." [27]

Both the House Report and the Senate Report thus make clear the congressional intent to retain a considerable, though not exclusive, federal role in the development of the EIS.

Consideration of language offered to a congressional committee in the form of a bill, but rejected by the committee, often gives further insight into the meaning of the legislation actually enacted.[28] For that reason, the response of the committees to H.R. 3787, which "died" in the Senate committee, is worthy of analysis. H.R. 3787 was a proposed amendment to the Federal Aid Highway Act, and would have modified it by permitting an EIS to be prepared by the state agency if it were adopted by federal officials "after analysis and evaluation." Significantly, H.R. 3787 was limited in application—functionally, to federal aid highway projects, and geographically, to the three states of the Second Circuit.[29]

Primarily because of these two restrictions in the bill, it stayed in committee in the Senate and never

[26] *Id.* 10, *quoting with approval* House Report 6.

[27] *Id.*

[28] *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

[29] Senate Report 5.

came to a vote on the Senate floor.[30] But another of the reasons for the Senate Committee's decision not to report the bill out is even more important to the meaning of the bill that was in fact enacted and which is before the Court today. The Committee believed that "one reading of H.R. 3787 is that it permits virtual total delegation of EIS requirements to the states. . . . [T]his degree of delegation is contrary to NEPA's most basic purpose of providing Federal accountability for the environment. . . . H.R. 3130 does not suffer from the same ambiguity, [and] would clearly not sanction such complete delegation. . . ." [31] The Committee's reasoning is a further indication of the desire on the part of Congress to maintain substantial federal control over the EIS.

The Senate debates on H.R. 3130 provide little aid in interpreting the bill. But the House debates indicate support by members from both sides of the aisle for retention of a strong federal role in the EIS, albeit with a modification of the standard that some Congressmen read in *Conservation Society I*. The author of H.R. 3130 specifically expressed a belief that the federal agency "must retain a large degree of the responsibility for the objectivity and completeness" of the EIS. In his mind, "close federal supervi-

[30] *Id.* 7. The House Committee on Merchant Marine and Fisheries rejected the bill for the same reason. House Report 2–4. The floor debates also demonstrate the concern for the problem. 121 Cong. Rec. H 2996 (remarks of Mr. Shuster), H 2999, H 3002 (remarks of Mr. Legget), H 3003–04 (remarks of Mrs. Sullivan), H 3004 (remarks of Mr. Forsythe), H 3005 (remarks of Mr. LaFalce) (April 21, 1975). Nonetheless, H.R. 3787 passed the House on April 21, 1975, by a vote of 275–99. *Id.* H 3009.

[31] Senate Report 8.

sion . . . is crucial."[32] The chairman of the subcommittee that had first considered H.R. 3130 and the ranking minority member of the Committee observed that delegation of EIS responsibilities was contemplated by the bill only if accompanied by a full, independent evaluation of environmental factors by the federal agency.[33] Another minority member of the Committee explained to his colleagues that the bill was designed to clear up the ambiguity over whether the Court in *Conservation Society I* had held that the federal agency must do all the work in preparing the EIS, or had held only that preparation by the state agency is permissible if the federal agency evaluates the environmental factors independently. Enactment of the bill would demonstrate that Congress adopted the later interpretation, he stated, and would emphasize the requirement that the federal agency conduct its own independent evaluation of the information supplied by the state agency.[34]

A reading of the debates and the two committee reports uniformly reinforces my understanding of the already unambiguous statutory language.[35] By

[32] 121 Cong. Rec. H 3006 (remarks of Mr. LaFalce) (April 21, 1975).

[33] *Id.* H 3007 (remarks of Mr. Leggett), H 3004 (remarks of Mr. Ruppe).

[34] *Id.* H 3004 (remarks of Mr. Forsythe). Similarly, the Chairman of the Committee stated on the floor that the bill dealt only with the *extent* of delegation to be permitted. *Id.* H 3003 (remarks of Mrs. Sullivan). The continuing importance of the federal role under the terms of H.R. 3130 was also emphasized by Russell W. Peterson, the Chairman of the Council on Environmental Quality, in a statement delivered before the Senate Committee. Senate Report 16.

[35] *Cf.* Justice Frankfurter's reference to "the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956).

Public Law 94–83, Congress has now acted to allow the state agency to prepare the EIS under certain circumstances. But it has imposed a strict requirement of federal control in the process. The federal agency, according to the Congressional mandate, must guide the state agency during the preparation of the EIS. The federal agency must actively participate in that preparation. And the federal agency must review and evaluate the EIS independently, meeting its own responsibility to be fully accountable for the environmental ramifications of the proposed project. These are not duties that are fulfilled easily, or without substantial effort, input, and understanding. Congress has rejected the idea that the federal agency must perform all the work involved in preparing the EIS, but it has reaffirmed the principle that ultimate control must rest in federal hands.

C.

It is that set of conclusions, derived from a review of the legislation and its history, which in all deference leads me to a judgment different from that of the majority. I conclude that the federal involvement in the Route 7 EIS, as described in the factual findings made by the district court,[36] was inadequate even under the modified statutory provisions.

Among others, the following findings were made by the district court: (1) Arthur Goss, a planning engineer with the Vermont Highway Department (VHD), was the person "primarily responsible for the writing and preparation of the EIS. . . ."[37]

[36] The findings of fact are not challenged here.

[37] *Conservation Society* v. *Secretary of Transportation*, 362 F.Supp. 627, 629 (D. Vt. 1973).

(2) "[A] draft EIS was prepared by the VHD in consultation with but not under the supervision of" the Federal Highway Administration (FHWA).[38] (3) The draft EIS was "examined" and "considered" by FHWA officials. These officials made three suggestions regarding the draft, one of which concerned the environment.[39] (4) "There is no indication whatsoever that the FHWA or any of its employees conceived, wrote or even edited any section of or passage in the EIS. At the most there were informal chats touching upon the subject, together with [one] field trip [to the site of the proposed project] and subsequent 'review.'"[40]

When faced with this factual record, I cannot conclude that the standard for federal involvement contained in the amendment to NEPA has been met. The FHWA did not guide VHD in the preparation of the EIS. It did not actively participate in the preparation of the EIS. There is no evidence that the FHWA's review of the draft EIS written by the VHD was an independent and critical evaluation of the environmental considerations inhering in the Route 7 project. The federal role was not, in my mind, the substantial one envisioned by Congress.

I would therefore affirm that portion of the district court's judgment which concerns the degree of federal involvement that NEPA requires in the preparation of the EIS, or, at most, remand the cause for further analysis by the district court in light of the amendment to NEPA.

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[38] *Id.* at 629–30.

[39] *Id.* at 630 & n.1.

[40] *Id.* at 632.

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